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November 8, 2002

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Written Ex Parte Communication, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

AT&T writes this letter in response to SBC's October 28, 2002, ex parte submission in which SBC provided an "overview" of the broadband proceedings currently before the Commission.[1] The SBC Ex Parte set forth a number of factual and legal misstatements regarding the unified loop unbundling element currently under consideration in the FCC's UNE Triennial Proceeding. In particular, this letter provides a brief summary in response to SBC's claims that ILECs should not be required to unbundle any of their "new" broadband investments because: (1) the investments are part of a separate "packet switched" network that are not subject to the Commission's unbundling rules; (2) the existence of cable modem service precludes a finding that CLECs are impaired without unbundled access to the unified loop element; and (3) unified loop unbundling would discourage future ILEC broadband investment. These claims are flatly wrong.

[1] Ex Parte Letter from Jonathan J. Boynton, SBC Assoc. Director, Federal Regulatory, to Ms. Dortch, FCC Secretary, CC Docket Nos. 01-337, 01-338, 02-33; CS Docket No. 02-52, dated Oct. 28, 2002.

I. Nothing About the Deployment of a Unified Loop Changes Either the Basic Characteristics of a Loop or the CLECs' Right to Access Such Loops as an Unbundled Element.

A. Despite SBC's rhetoric, unified loops are just loops, *not* part of a separate packet switching network or a "broadband UNE-platform".

Contrary to SBC's continued attempts at obfuscation, unified loop facilities do not provide *any* "packet switching" functionality. AT&T has repeatedly demonstrated that there is nothing about the NGDLC (or "unified") loop architecture being installed by the ILECs that changes the basic characteristics of the loop element. *See*, *e.g.*, AT&T at 170-190; AT&T Reply at 225-240 and Gerszberg Reply Decl., Part III; Joseph P. Riolo Declaration, CC Docket No. 98-147, ¶¶ 42-64 (filed Oct. 12, 2000). Those loops, just like all others, simply provide connectivity between a customer's premises and a distribution frame (or its equivalent) in an ILEC central office. 47 C.F.R. § 51.319(a). They are *not,* as SBC asserts, part of a separate "packet switching" network. SBC Ex Parte, Slide 2. In fact, unified loop facilities connect two and only two points – the customer's premises and the ILEC LSO. No packet switching – or other switching – functionality can possibly occur over such facilities. *See* AT&T Reply Comments, Gerszberg Reply Dec., Part III.

SBC's assertion rests on the faulty premise that transmission facilities between a customer's premises and the central office can – or should – be balkanized into "loop" and "not loop" categories based on arbitrary and impermissible distinctions between two types of multiplexing, *i.e.*, statistical and time division multiplexing. SBC Ex Parte, Slide 2 (compare "Loop 2" with "Loop 3"). But notwithstanding the legal errors associated with SBC's position already described in AT&T's comments (at 170-179) and reply comments (at 225-238), it is neither practical nor feasible to fashion a separate so-called "packet switching network" approach to unbundling to portions of a next generation architecture because there is in fact only *one integrated network*. *See, e.g.*, AT&T at 166-67, 176; ALTS at 85-86; Sprint at 18-19; Covad at 53-55, 60; AT&T Reply at 238. As AT&T and others have explained in detail, the deployment of NGDLC technology is simply part of a natural progression in loop plant technology that pre-dated the Act. See, *e.g.*, AT&T at 191; *see also* Sprint at 19-20; WorldCom, Stumbaugh/Reilly Dec. ¶¶ 7-18. Indeed, there is very little infrastructure that needs to be added into an ILECs' network, particularly when the ILEC has already deployed a fiber-fed, DLC-equipped loop infrastructure to improve the efficiency of its voice service offering.

For similar reasons, SBC's claim that CLECs UNE proposals "equate to broadband 'UNE platform'" are flatly wrong. SBC Ex Parte at 11. Despite the impression SBC seeks to create, AT&T seeks *only* to be assured of the ability to access unified loops at the ILEC central office, *not* the right to access ILEC "packet switching." Thus, the loop element, not packet switching, is the relevant reference point for determining whether competitors are impaired without unbundled access to the unified loop.

B. SBC mistakenly claims that the FCC's rules only apply to so-called "legacy circuit switched networks".

SBC's claim that the unbundling requirements should be limited to the ILEC's so-called "legacy-circuit switched network" is made of whole cloth. *See* SBC Ex Parte at 2, 11, 21. As a threshold matter, the legislative history of the 1996 Act reflects that Congress knew and understood the emerging technologies that were being developed and deployed by ILECs, wireless companies, and cable companies when it required the ILECs to unbundle their networks.[2/] If Congress believed that cable and wireless competition alone would be sufficient to constrain ILEC market power, it would merely have required ILECs to provide interconnection.[3/]

In fact, AT&T has shown that the ILECs' NGDLC network upgrades are nothing more than the logical extension of network architecture capabilities that were available long before passage of the 1996 Act. *See* AT&T Comments at 19-22, 168, 170, 173-74, 178, 180, 184-186; AT&T Reply Comments at 73, 79-80, 87, 102, 152-153, 193-200. While the ILECs have mounted an aggressive public campaign to sidestep this reality, the fact remains that the loop infrastructure investments that ILECs are making today (and have said they will be making over the next several years) are purely incremental to the ILECs' existing monopoly networks and consist of modifications or upgrades to the feeder portions of *existing* loops (*e.g.*, installing fiber feeder for existing loops and/or new DLC electronics in existing loops).

2/ *See, e.g.*, 141 Cong. Rec. H8284 (daily ed. Aug. 2, 1995) (statement of Rep. Fields) ("Since Alexander Graham Bell invented the telephone, this is only the second time the Government has focused and dealt with telecommunication policy. The first time was 61 years ago in the 1934 Communication Act when our country utilized radio, telegraph, and telephone technology. The Congressmen and Senators in 1934 could not have envisioned the technology that we enjoy today. They could not have envisioned the advantages of digital over[] analog transmission. They could not have envisioned that clear voice transmission, along with data and video, could be accomplished without a wire. They could not believe that you could digitally compress and transmit as much as six times the current broadcast signal with the same or enhanced video capabilities.").

3/ In fact, however, Congress considered and rejected a "regulatory parity" proposal prior to the enactment of the 1996 Act. *See, e.g.*, *Stevens Draft Includes 'Title VII' Provision; Senator Hopes to Include Language in Other Bills*, Telecommunications Report, Apr. 18, 1994, at 1-2; *White House Working to Include 'Title VII' in Telecom Bills; Hollings Says Provision 'Isn't Realistic At This Time*, Telecommunications Report, Feb. 28, 1994, at 4-6. Under one version of this proposed framework, all providers of "advanced" services would have been subject to similar access and interconnection obligations. *See NARUC Adopts Package of Legislative Resolutions to Guide Negotiations on Fast-Moving Telecom Bills*, Telecommunications Report, Mar. 7, 1994, at 10-15 (describing specifics of proposed Title VII and NARUC's opposition thereto).

For example, the ILECs have already made significant DLC and fiber investments over the past decade to provide voice services more efficiently.[4] SBC has not seriously disputed the fact that CLECs are impaired without access to the ILECs' DLC-equipped loop infrastructure for voice services. Yet, when SBC upgrades that loop element to transmit DSL services to customers (*see* Slide 2), the SBC argues that the addition of certain equipment on the loop – which, in some cases, involves only the addition of a RT-based plug-in and an OCD in the central office – removes any impairment associated with the upgraded loop element. There is, however, no legal or technical logic to support a claim that CLECs are impaired with respect to the basic loop infrastructure but not impaired when a different line card is employed and a portion of that same infrastructure is connected to an OCD in the LSO.

II. SBC's Claim that Cable Modem Service Deployment Precludes a Finding that CLECs Are Impaired Without Unbundled Access to the Unified Loop Element is Meritless.

The SBC Ex Parte includes a number of slides (Slides 4-6) that are designed, in part, to further SBC's claim that the existence of cable modem services precludes a finding that CLECs are impaired without unbundled access to the unified loop element. Notwithstanding the fact that SBC uses cable modem deployment estimates that differ greatly from other analyst projections submitted into the record, the existence of cable modem services does not provide a cognizable alternative to unified loop unbundling. This is true for several reasons. *First*, while the Supreme Court stated that the Commission must consider the existence of alternative elements, it must do so only to the extent that such alternative elements are available to the CLEC. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 392-93 (1999). Because a requesting CLEC has virtually no ability to obtain access to a cable company's facilities for purposes of providing competing services, the mere existence of cable modem service does not provide any CLEC with a cognizable alternative as defined by the Act.

Second, in addition to this threshold legal issue, the existence of cable modem services also does not address the specific question of impairment under section 251(d)(2), because such service does not provide a CLEC with the ability to provide bundled voice and DSL services offerings in competition with the ILECs. As noted in AT&T's comments, the emerging trend toward the bundling of DSL-based services and voice service puts CLECs at an enormous competitive disadvantage in providing voice services if they cannot also offer DSL-based services in combination with such voice services. AT&T at 93-96 & Willig Dec. ¶¶ 185-86; AT&T Reply at 220-223. For example, the ILECs are using their DSL services to block CLECs' access to voice and other narrowband services used to serve their DSL customers by: (1) requiring customers to subscribe to ILEC voice service as a condition of obtaining DSL-based services; (2) refusing to allow customers to use CLEC-provided voice services with their DSL service; and (3) refusing to

[4] *See, e.g.*, RHK, Inc., *Optical Access: North America: Service Provider Competitive Analysis: BellSouth, Qwest, SBC, and Verizon - Deployment and Trends for DLC and PON*, at 26, Figure A-1 (Dec. 2001) ("*RHK Report*") (available at http://www.rhk.com/clientzone/catalog.asp) (providing ILEC DLC deployment history from 1991-2000).

convert voice customers to UNE-P if they have ILEC DSL service. In fact, "ILEC DSL on the line" is one of the most commonly received responses for UNE-P rejection orders.

In 2002 alone, more than 20,000 residential customers requesting AT&T local voice services have been refused. More than 7000 of these customers are in New York, where AT&T has been in the local market all year. The rest are from states that AT&T entered mid-year. To date, over 4,000 Georgia residents, nearly 4,000 Illinois residents, over 2,300 Michigan residents and nearly 2000 Ohio residents have been denied their choice of AT&T local voice service unless they are willing to forego, cancel or change their DSL service. Even though AT&T only entered the California and New Jersey local markets in mid-August, it appears that over 6,000 California customers and over 1,500 New Jersey customers have been denied their choice of AT&T local service in just over two months. As DSL adoption increases, this problem will impact an increasing percentage of the residential market. Without unbundled access to unified loops, AT&T will be unable to offer DSL and compete effectively with the ILEC for voice/DSL customers in areas served by NGDLC. Without a viable intramodal alternative, the ILECs will continue to use their ever-increasing DSL-customer base to impair local voice competition.

Third, to the extent that the Commission chooses to consider intermodal competition as an additional factor in making its analysis under section 251(d)(2), the record – and indeed the Commission's own orders – show that *intra*modal competition from data CLECs motivated the incumbents to implement NGDLC technology, *First Section 706 Report* ¶ 42, rather than ignore it in hopes of maximizing profits on second lines. Further, the market facts show that (1) the ILECs raised prices on DSL service as soon as the data CLECs were thwarted; (2) cable competition did not force the ILECs to retract such increases; and (3) ILECs are calling for still higher DSL rates.[5]

Finally, the record is clear that relying on intermodal competition to preclude CLECs from accessing unified loops would create huge *disincentives* to CLEC investment in packet switches and other equipment needed to provide DSL-based services -- which they must always obtain for themselves even if they get access to unified loops. See, e.g., AT&T Reply Comments at 194, 222-225.

III. There Is No Merit to SBC's Argument that "Broadband Unbundling" Impedes Facilities-Based Investment.

AT&T has already refuted in detail SBC's baseless contention (at Slide 10) that unbundling obligations reduce investment, either by competitive or incumbent LECs. *See, e.g.*, AT&T Comments at iii-iv, vi-viii, 40-88; AT&T Reply Comments at iv, vii, 8, 11-15, 21-25, 126-136. BellSouth has already built out DSL capability to approximately 72% of its customers (BellSouth Financial Report Third Quarter 2002 at 3), and the other RBOCs are rapidly building out to match BellSouth. In fact, BellSouth has boasted to the financial

[5] *See* Vikas Bajaj, *Phone, Broadband Prices Too Low, Verizon Exec Says*, The Dallas Morning News (June 5, 2002) (quoting Verizon vice chairman and president Lawrence T. Babbio, Jr. as stating that digital subscriber lines "should be 40 percent to 50 percent more expensive").

community that the incremental cost of upgrading its existing network to deliver DSL-based service over unified loops is *minimal* on top of the fiber investment it has already made to provide POTS more efficiently and that it is "enthusiastic about the progress of its DSL business, both from a growth and economic standpoint . . . . The DSL business is projected to be EBIDA breakeven by YE02 . . . [and] solidly EBIDA positive in '03, bolstering overall margins." Lehman Brothers Equity Research Report dated Sept. 13, 2002. SBC, for its part, stated that it expected to recover the entire expense of its "Project Pronto" from savings on its narrowband network alone. And despite an unattributed claim in its Reply that such savings have not materialized, SBC's 2Q2002 investor briefing calls DSL a bright spot and states that "in addition to its stand-alone economics, DSL also generates value by helping to reduce wireline churn for local services by 75%." SBC Investor Update: 2nd Quarter Earnings dated July 23, 2002. Since ILECs have publicly recognized that DSL is among their greatest "growth drivers" and in fact already built out DSL capability to a large majority of customers, there is no reason to believe the threat that they would cease any remaining investment in NGDLC.

Moreover, there is little, if any, additional expense associated with AT&T's unified loop proposal, which only requires the ability to access customers' high frequency signals at a port connection on the OCD in the serving ILEC end office. *See* AT&T Reply, Gerszberg Reply Dec., Part IV. ILECs can provide unbundled access to unified loops without imposing any significant capacity restraints on the network. *See id.* CLECs' incentives to construct their own packet switching and transmission facilities are significantly reduced if they cannot access their customers' telecommunications signals at an ILEC central office. AT&T at 77; AT&T Reply at 222-225.

In short, there are no reasonable, legal, economic, technical or policy reasons for denying CLECs unbundled access to the ILECs' unified loops. In this proceeding, AT&T and other CLECs have again provided clear and essentially uncontroverted evidence that competitors, who lack the ILECs' existing customer base and facilities, cannot practically or economically replicate the loop element, "unified" or otherwise. Indeed the unrebutted evidence shows that CLECs' impairment relating to unified loops is significantly greater than the impairment related to ordinary copper loops. *See*, *e.g.*, AT&T Reply at 200-219.

Critically, however, competition for voice and advanced telecommunications services alike will be irreparably harmed if the ILECs can continue to prevent competitors from accessing unbundled unified loops at the central office. In particular, as ILECs install fiber and associated electronics for both voice and DSL services, competitors would lose access to ILECs' networks for voice as well as data services and will effectively be walled off from competition. Thus, CLECs must be entitled to unbundled access to the unified loops, which include all of the attached electronics used to support the provision of transmission functionality between the ILEC's central office and the customer's premises.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,

Joan Marsh

cc: Thomas Navin
Robert Tanner
Jeremy Miller